BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

In the Matter of: **TRANSERVICIOS, SA de CV,** **Respondent.**	**Docket No. FMCSA-2010-0043**[1] **(Southern Service Center)**

ORDER APPOINTING ADMINISTRATIVE LAW JUDGE

1. Background

On November 5, 2009, the Texas Division Administrator, Federal Motor Carrier Safety Administration (FMCSA), issued a Notice of Claim to Respondent, Transervicios, SA de CV, proposing a civil penalty of $2,840 for one alleged violation of the Hazardous Materials Regulations (HMRs). Specifically, the Notice of Claim, which stated that it was based on an October 6, 2009 inspection of one of Respondent's motor vehicles, charged Respondent with one violation of 49 CFR 177.817(a), for transporting a shipment of hazardous materials without a shipping paper.[2]

On December 3, 2009, Respondent replied to the Notice of Claim, denying the violation and stating that it does not pack, load, or unload the contents of the trailers that it hauls. "Except for the customer shipping papers, we have no knowledge of what is loaded." It contended that opening the sealed trailers to verify the accuracy of the shipping papers would be a violation of US Customs and Border Protection C-TPAT

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[1] The prior case number of this matter was TX-2010-0008-US1277.

[2] See Government Exhibit A to Field Administrator's Consent to Hearing and Notice of Intent to File Motion for Final Order (Claimant's Consent).

procedures. Respondent argued that the violation was the fault of its customer.[3] By letter dated January 21, 2010, but served January 29, 2010, Respondent submitted a request for a hearing.

On February 11, 2010, Claimant, the Field Administrator for FMCSA's Southern Service Center, stated that he consented to a hearing and provided notice that he will be filing a Motion for Final Order showing that there is no genuine issue of material fact in this proceeding. He stated that because Respondent did not specify the relief sought, an FMCSA enforcement specialist called Respondent to ascertain whether it would be electing binding arbitration or a hearing. Claimant stated that while he was waiting for a response, the 60 days for him to object to a hearing request elapsed. He stated that even though the time had run for him to object to a hearing, there is no dispute of material fact. Accordingly, he stated that he would be filing a Motion for Final Order.

On March 5, 2010, Respondent submitted a Response to Notice of Intent to File Motion for Final Order, providing additional reasons, including exhibits, why it should be granted a formal hearing. It noted that under C-TPAT, the only parties other than the ultimate consignee that are permitted access to the sealed trailers are Mexican and United States customs and drug enforcement officials or other United States Federal authorities at the international border. Respondent stated that it was ignorant of the content of the shipment, except as indicated in the original cargo manifest, which identified the shipment as "Air Bag Inflators."

2. Decision

Although Claimant consented to a hearing, it appears that he would have objected

[3] See Government Exhibit B to Claimant's Consent.

had he not believed that the time to object had expired. Claimant argued that while he was attempting to obtain clarification as to whether Respondent would elect binding arbitration or a hearing,[4] the time to object to a hearing elapsed. Claimant made particular note of the fact that although Respondent's request for a hearing was dated January 21, 2010, it was not mailed until January 29, 2010.

Claimant is mistaken that the time to object to a hearing had elapsed. In accordance with 49 CFR 386.16(b)(2), Claimant had 60 days from the service date of the Reply to serve either a consent or objection with basis to the hearing request. Even if I use the December 3, 2009 date as the effective date of the Reply, Claimant had until February 8, 2010, in which to submit either a consent or objection to a request for a hearing.[5] Since the Federal Express receipt submitted by Claimant shows that Claimant received the request for hearing on February 1, 2010, Claimant still had seven days until the deadline. Therefore, Claimant's time had not elapsed while waiting for clarification from Respondent.[6] Moreover, because Respondent had not actually requested a hearing until it served its request on January 29, 2010, its Reply was not perfected until then.[7] As a result, Claimant had until April 5, 2010, in which to consent or object.[8] Therefore, when Claimant submitted his consent to a hearing on February 11, 2010, he could have

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[4] Binding arbitration would not have been an option because Respondent contested and denied the violation.

[5] Sixty days from December 3, 2009 was February 1, 2010. Five days are added for mailing in accordance with 49 CFR 386.8(c)(3), bringing the due date to February 6, 2010. Because February 6th fell on a Saturday, however, the due date for serving a consent or objection was Monday, February 8, 2010.

[6] Claimant could have requested additional time in accordance with 49 CFR 386.5(f).

[7] I would not penalize Claimant for being considerate enough to ask Respondent how it wished to proceed after denying the violation.

[8] Sixty days plus five days for mailing was April 4, 2010, which was a Sunday. Accordingly, the due date would have been Monday, April 5, 2010. See *Supra*, Note 5 for calculating the due date.

served an objection, if that were his intention.

Nevertheless, Claimant did consent to a hearing, and the matter is referred to the Office of Hearings of the United States Department of Transportation. Moreover, that is the correct result in this case. Had Claimant objected, I would still have sent the matter to the Office of Hearings. Not only do the Rules of Practice permit me to refer any matter for formal hearing,[9] but this office has long held that the decisionmaker has the authority to order a hearing to resolve questions of fact, issues of law, or in the interests of justice.[10] Here, there are questions that have not been resolved by the pleadings to date, including whether Respondent was permitted to open the sealed trailers and the meaning of "Air Bag Inflators."[11] Claimant may file his Motion for Final Order with the administrative law judge.

3. Appointment of Administrative Law Judge

An administrative law judge is hereby appointed, to be designated by the Chief Administrative Law Judge of the Department of Transportation, to preside over this matter in accordance with 49 CFR 386.54, and render a decision on all issues, including the civil penalty, if any, to be imposed. The proceeding shall be governed by subparts D and E of 49 CFR Part 386 of the Rules of Practice and all orders issued by the

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[9] See 49 CFR 386.16(C).

[10] *In the Matter of Empire Transport Co., Inc.*, Docket No. FHWA-97-2692, Order, October 21, 1994, at 3, citing *In Re Gunther's Leasing Transport, Inc.*, 58 Fed. Reg. 16985, 16986 (FHWA 1993) Order.

[11] Note that 49 CFR 171.2(f) provides that "[e]ach carrier who transports a hazardous material in commerce may rely on information provided by the offeror of the hazardous material … unless the carrier knows or, a reasonable person acting in the circumstances and exercising reasonable care, would have knowledge that the information provided by the offeror … is incorrect."

administrative law judge.

It Is So Ordered.

Rose A. McMurray
Assistant Administrator
Federal Motor Carrier Safety Administration

5-21-10
Date

CERTIFICATE OF SERVICE

This is to certify that on this 24 day of May, 2010, the undersigned mailed or delivered, as specified, the designated number of copies of the foregoing document to the persons listed below.

Colbert N. Coldwell, Esq.
Counsel for Respondent
Guevara, Baumann, Coldwell & Reedman, LLP
4171 n. Mesa, Ste B201
El Paso, TX 79902
(915) 544-6646 (Telephone)
(915) 544-8305 (Fax)

One Copy
U.S. Mail

Matthew J. Hardy, Esq.
Trial Attorney
Office of Chief Counsel (MC-CCE)
Federal Motor Carrier Safety Administration
Southern Service Center
1800 Century Blvd., NE, Suite 1700
Atlanta, GA 30345
(404) 327-7376 (Telephone)
(404) 327-7359 (Fax)

One Copy
U.S. Mail

Darrell L. Ruban
Field Administrator
Southern Service Center
Federal Motor Carrier Safety Administration
1800 Century Blvd., NE, Suite 1700
Atlanta, GA 30345

One Copy
U.S. Mail

Joanne A. Cisneros
Texas Division Administrator
Federal Motor Carrier Safety Administration
903 San Jacinto Blvd., Suite 101
Austin, TX 78701

One Copy
U.S. Mail

The Honorable Ronnie A. Yoder
Chief Administrative Law Judge
Office of Hearings, M-20
U.S. Department of Transportation
1200 New Jersey Avenue, S.E.
East Building Ground Floor
Room E12-320
Washington, D.C. 20590

One Copy
Personal Delivery

FMCSA-2010-0043

U.S. Department of Transportation
Docket Operations, M-30
West Building Ground Floor
Room W12-140
1200 New Jersey Avenue, S.E.
Washington, D.C. 20590

Original
Personal Delivery

Jennie Miller